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No. 94-377

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BRESNAN COMMUNICATIONS COMPANY,
LIMITED PARTNERSHIP,
a Michigan limited partnership,
Petitioner,

v.

CITY OF HUNTSVILLE, ALABAMA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a contract for the purchase of a cable system, contingent on approval by a city of the transfer of the system's ownership, was a property interest to which a takings analysis under the Fifth and Fourteenth Amendments was applicable after the city lawfully denied the transfer.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, the City of Huntsville, Alabama, *et al.* (hereinafter "Huntsville"), respectfully request that this Court deny the Petition for a Writ of Certiorari filed by Petitioner Bresnan Communications Company, Limited Partnership (hereinafter "Bresnan"). Bresnan seeks review of a *per curiam* decision by the United States Court of Appeals for the Eleventh Circuit (Pet. App. A), affirming Orders entered by the United States District Court for the Northern District of Alabama. (Pet. App. B and C.) For the reasons set forth below, Huntsville urges this Court to deny the Petition.

STATUTORY PROVISION INVOLVED

Section 613(d) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, provides:

> (d) Any State or franchising authority may not prohibit the ownership or control of a cable system by any person because of such person's ownership or control of any other media of mass communications or other media interests. Nothing in this section shall be construed to prevent any State or franchising authority from prohibiting the ownership or control of a cable system in a jurisdiction by any person (1) because of such person's ownership or control of any other cable system in such jurisdiction; or (2) in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction.

47 U.S.C. § 533(d) (Supp. 1992).

COUNTERSTATEMENT OF THE CASE

This action arises out of Bresnan's challenge to the 1990 denial by Huntsville of the transfer of the franchise held by Cable Alabama for its Huntsville cable system to Bresnan. *See* Bresnan's Complaint for Declaratory Relief and Damages and Demand for Jury Trial (filed Nov. 14, 1991) (hereinafter "Complaint"). (A copy of the Complaint is attached hereto as Appendix A.) Cable Alabama had a contractual relationship with Huntsville in the franchise it sought to transfer to Bresnan; Bresnan had no contractual interest in any Huntsville franchise. *See* District Court's Memorandum of Opinion at 5 n.2 (entered Mar. 29, 1993) (hereinafter "Mar. 29 Mem. Op."). (Pet. App. at 17a.)

Bresnan signed a contingency contract to purchase the Huntsville cable systems of both Cable Alabama and Comcast Cablevision of Huntsville, Inc. (hereinafter

"Purchase Contract"). Complaint at ¶ 28. (App. at 7a.) As Bresnan readily admits in its Petition, "both purchase agreements were *conditioned* upon the complete execution of the other" and contingent upon Huntsville's approval of Bresnan's purchase of Cable Alabama. (Pet. at 3.) (Emphasis added.) *See also* Complaint at ¶¶ 29-30 ("Pursuant to Section 14 of the Cable Alabama franchise, Cable Alabama had to acquire approval by the City of the transfer of its cable system to Bresnan"; "Bresnan's purchase of the Comcast system in Huntsville was contingent upon approval by [the City] of Bresnan's acquisition of the Cable Alabama system."). (App. at 7a-8a.)

The petition of Cable Alabama to transfer its cable franchise in Huntsville to Bresnan was presented to the Mayor of Huntsville on August 29, 1989. The City Council denied the petition on April 10, 1990. (Pet. App. at 31a-38a.) Bresnan took no action to challenge the denial until November 1991. *See* Complaint. (App. A.)

In the meantime, in May 1990, Cable Alabama filed a civil action against Comcast, which owned the other cable system in Huntsville, for predatory pricing and intentional interference with contractual relations. *See Cable Ala. Corp.* v. *City of Huntsville*, 768 F. Supp. 1484, 1492 (N.D. Ala. 1991) (hereinafter "*Cable Alabama*"). On October 29, 1990, the judge in that case approved a settlement agreement that called for Comcast to acquire Cable Alabama's cable system in Huntsville by September 1991. *Id.*

As a result of this settlement agreement, Cable Alabama petitioned Huntsville for a transfer of its franchise to operate its Huntsville cable system to Comcast. *Id.* On March 7, 1991, Huntsville rejected the Cable Alabama/Comcast transfer request. *Id.* at 1494.[1]

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[1] Bresnan's suggestion in its Statement that Huntsville did not disapprove Cable Alabama's request to transfer its franchise to

Cable Alabama filed a lawsuit two weeks later, on March 21, 1991, challenging Huntsville's denial of the transfer of its franchise to Comcast. *Cable Alabama*, 768 F. Supp. at 1486. On August 6, 1991, the District Court found that Huntsville had improperly denied the transfer of the franchise to Comcast based on, among other grounds, the fact that Section 613 of the Cable Communications Policy Act of 1984, 47 U.S.C. § 533 (hereinafter "1984 Act"), prohibited Huntsville "from regulating the ownership or control of local cable television systems based upon the ownership or control of any other cable television system . . . ." *Cable Alabama*, 768 F. Supp. at 1500.

Bresnan until March 7, 1991 is simply wrong. (Pet. at 3-4.) Bresnan made the same erroneous claim before the Eleventh Circuit, as Huntsville noted in its brief before that Circuit. Bresnan inexplicably repeats the same error here. The record clearly demonstrates that disapproval of the Bresnan application occurred on April 10, 1990. (Pet. App. at 31a-38a.) *See also* Complaint at ¶ 36. (App. at 9a.) The only transfer request at issue on March 7, 1991 was Cable Alabama's request to transfer its franchise to Comcast—a request entirely unrelated to the Bresnan transfer request that Huntsville had denied one year earlier. In the lawsuit that Cable Alabama brought on March 21, 1991, the District Court's holdings only addressed the legality of Huntsville's actions with regard to the denial of the franchise transfer from Cable Alabama to Comcast. The District Court, in this action, made clear that its rulings in the *Cable Alabama* decision did not apply to Huntsville's denial of the transfer from Cable Alabama to Bresnan. *See* District Court's Order (dated Sept. 18, 1992) (finding that *Cable Alabama* did not collaterally estop Huntsville from litigating issues raised by Bresnan's claims) (attached hereto as Appendix B); *see also* District Court's Memorandum of Opinion (entered Dec. 4, 1992) at 5 ("On August 6, 1991, in *Cable Alabama*, this court held that Huntsville's refusal to permit Cable Alabama's transfer of its franchise rights to Comcast violated Cable Alabama's rights. There has never been a determination that Huntsville violated Bresnan's rights when it refused the transfer of Cable Alabama in April 1990.") (hereinafter "Dec. 4 Mem. Op."). (Pet. App. at 23a-24a.) Significantly, as the Eleventh Circuit noted, Bresnan never challenged on appeal the District Court's holding that Huntsville was not collaterally estopped from litigating the issues raised by Bresnan in its action. (Pet. App. at 8a.)

Thereafter, on November 14, 1991, Bresnan finally filed its own action against Huntsville in the District Court. *See* Complaint. (App. A.) Bresnan claimed that Huntsville violated Section 613 of the 1984 Act when, on April 10, 1990, it denied Bresnan's application to acquire the cable franchise of Cable Alabama. *Id.* at 13. (App. at 12a-13a.) Bresnan's claim that Huntsville's actions violated Section 613 was based upon the holding by the District Court in *Cable Alabama* that the 1984 Act does not permit a franchising authority to deny a transfer of a cable franchise on the grounds that the transfer will eliminate competition. *See* Dec. 4 Mem. Op. at 8. (Pet. App. at 21a-22a.)

On October 5, 1992, during the pendency of pre-trial discovery in Bresnan's lawsuit, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.) (hereinafter "1992 Act"). The 1992 Act directly affected Bresnan's action in two ways. *First*, the 1992 Act clarified the meaning of Section 613(d), making it clear that a city may take competitive considerations into account in ruling on franchise transfer applications. The legislative history accompanying the clarification to the section stated that the purpose of the clarification was to specifically overturn *Cable Alabama*, thus elimniating the legal grounds upon which Bresnan's action was based. *See* H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 90-91 (1992) ("House Report"). (A copy of the relevant portions of the House Report is located at Appendix C.) *Second*, Section 635A of the 1992 Act provided that in all *pending* cases against a franchising authority arising out of the disapproval by the authority of a transfer of a franchise, relief shall be limited to injunctive and declaratory relief, thus barring Bresnan's claim for monetary damages.

On October 23, 1992, Huntsville filed a Motion to Dismiss or, in the Alternative, for Judgment on the Plead-

ings, based on the fact that Bresnan's claims for money damages, costs and attorney's fees were barred by Section 635A of the 1992 Act, and that the 1992 Act explicitly clarified that the counts of Bresnan's Complaint, which were based on the alleged violation of Section 613 of the 1984 Act, did not state a claim upon which relief could be granted. On December 4, 1992, the District Court granted Huntsville's Motion to Dismiss, finding that application of Section 635A did not deprive Bresnan of a property right and barred Bresnan's action for damages. *See* Dec. 4 Mem. Op. at 5-6. (Pet. App. at 25a-27a.)

On December 16, 1992, Bresnan filed a "Motion for Rehearing" with the District Court, which, among other things, challenged the portion of the District Court's December 4 Order addressing the "takings" claim. The District Court denied the Motion on March 29, 1993. The District Court found that Bresnan's purchase contract for Cable Alabama's cable system, which was contingent on Huntsville's approval of the transfer of Cable Alabama's franchise to Bresnan, did not amount to a property interest to which a takings analysis was applicable. Mar. 29 Mem. Op. at 4. (Pet. App. at 16a-17a.)

Bresnan then appealed to the Eleventh Circuit. On April 7, 1994, the Eleventh Circuit affirmed, *per curiam*, the District Court's dismissal of Bresnan's claims with prejudice on the grounds that Bresnan had no property interest in the purchase contract to which a takings analysis was appropriate.[2] Bresnan's Petition for Rehearing and Suggestion of Rehearing En Banc was denied on June 2, 1994.

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[2] Contrary to Bresnan's assertion, the Eleventh Circuit did not conclude that the "contracts at issue 'gave Bresnan no more than an *option* to purchase the franchise . . . .'" (Pet. at 14 n.6.) (Emphasis in original.) The Eleventh Circuit merely summarized Huntsville's argument that the Purchase Contract granted Bresnan such an option. (Pet. App. at 10a.)

REASONS FOR DENYING THE WRIT

Bresnan wrongly asserts that its Petition should be granted because this appeal raises an important question of constitutional law that conflicts with the rulings of this Court and with at least one other federal court of appeals. There is no issue of federal constitutional law at issue in this case. The *only* issue in this appeal is whether Bresnan had a property right in its contingent contractual expectation of acquiring Cable Alabama and Comcast. As Bresnan concedes, the "issue [of] whether a property interest exists for Fifth Amendment purposes is not a matter of general federal constitutional law." (Petit. at 5-6) *See Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984) ("Property interests . . . are not created by the Constitution.").

The Eleventh Circuit correctly affirmed the District Court's finding that Bresnan had no vested property interest in the Purchase Contract. Bresnan appears to suggest that, as a result of the Eleventh Circuit's decision, there is now a conflict between the Eleventh Circuit and the Sixth Circuit over a matter of general constitutional law. However, as Bresnan concedes, the Sixth Circuit's holding in *G.M. Engineers & Associates, Inc.* v. *West Bloomfield Township*, 922 F.2d 328 (6th Cir. 1990), squarely rested on the Sixth Circuit's interpretation of Michigan property law, not on general federal constitutional law. (Pet. at 6.) Such non-federal conflicts are not an appropriate basis for the grant of a writ of certiorari by this Court. *Compare Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) ("As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.").[3] There is no

[3] Moreover, *G.M. Engineers & Associates, Inc.* is clearly distinguishable from this case. In that case, the right of the landowner and developer to enter into a contract to develop and *sell* land was

conflict here between the Circuits on any issue justifying this Court's attention.

Given that Bresnan had no vested property interest to which to apply a takings analysis, the Eleventh Circuit properly refused to reach the merits of Bresnan's takings claim. Therefore, there is no conflict between the Eleventh Circuit and this Court's ruling in *Ruckelshaus*, which sets forth this Court's standard for determining whether a regulatory taking of *property* has occurred.

Bresnan fails to realize that the *Ruckelshaus* standard is inapplicable to its case since it had no property interest to which to apply the *Ruckelshaus* standard for a regulatory taking.[4] (Pet. at 7-9.) The threshold question in any takings analysis is whether a valid property right existed; in the absence of such a right, there is no need for further inquiry. *Chevron Chem. Co.* v. *Costle*, 641 F.2d 104, 114 (3d Cir.), *cert. denied*, 452 U.S. 961 (1981).[5]

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not subject to the approval of the Township. The parties only sought approval from the Township of a lot split of the land. In this case, Cable Alabama's right to *sell* its cable system *was subject* to Huntsville's approval; Cable Alabama had no independent right to sell the cable system without such approval. *G.M. Engineers & Associates, Inc.* would be analogous only if the right of the landowner to sell its land to the developer was subject to the Township's approval.

[4] Bresnan mistakenly states that, in *Ruckelshaus*, this Court recognized an intangible property right in Monsanto's trade secret based on the assumption that the EPA would keep the submitted material confidential. (Pet. at 10.) However, this Court made crystal clear that its determination that Monsanto's trade secret constituted property was based on Missouri law, not on whether the EPA regulations created a property interest. *Ruckelshaus*, 467 U.S. at 1003-04. Based on this state law property interest, the Court took into account EPA's disclosure of the trade secret only for the purpose of determining whether the EPA destroyed the company's "reasonable investment-backed expectation" in that property interest.

[5] *See also Sangre de Cristo Dev. Co.* v. *United States*, 932 F.2d 891, 894 (10th Cir. 1991) (to argue a successful takings claim,

THE ELEVENTH CIRCUIT PROPERLY CONCLUDED THAT BRESNAN HAD NO PROPERTY INTEREST TO WHICH THE COURT MIGHT APPLY A TAKINGS ANALYSIS

I. Bresnan Had No Property Right in the Proposed Purchase Contract

It is axiomatic that, to trigger Fifth Amendment protections, contractual rights must be "vested." *South Carolina State Educ. Assistance Auth.* v. *Cavazos*, 897 F.2d 1272, 1276 (4th Cir.), *cert. denied*, 498 U.S. 895 (1990). Unless a right in a contract is vested, it does not constitute a compensable property interest. *Sangre de Cristo*, 932 F.2d at 894-95.[6] Property interests do not vest in contracts predicated on state approval or where the state reserved the right to alter the contract.[7]

Bresnan's rights under the Purchase Contract were never vested into a protected property interest because, as Bresnan concedes, execution of the contract was predicated on approval by Huntsville of the transfer of Cable Alabama to Bresnan and such approval never occurred. The Eleventh Circuit properly affirmed the District Court's holding that, because Bresnan's contractual rights were contingent upon Huntsville's approval of the transfer

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plaintiff must prevail on *two separate* points: (1) the plaintiff at the time of the alleged taking had a vested interest protectable under the Fifth Amendment; and (2) the government's action constituted a taking), *cert. denied*, 112 S. Ct. 1760 (1992).

[6] *See also Virginia State Educ. Assistance Auth.* v. *Alexander*, 770 F. Supp. 1110, 1114 (E.D. Va. 1991) ("the object of any [constitutional] review, of course, must be *vested* contractual rights") (emphasis in original).

[7] *See, e.g., Rhode Island Higher Educ. Assistance Auth.* v. *Secretary, United States Dep't of Educ.*, 929 F.2d 844, 851 (1st Cir. 1991) (whether a contract right is vested depends on whether government reserved power to modify contract); *Virginia State Educ. Assistance Auth.*, 770 F. Supp. at 1114 ("where Congress reserves the power to modify a contract, vested contractual rights do not emerge").

of Cable Alabama to Bresnan, Bresnan's contractual rights were not vested and Bresnan thus did not have a valid property interest.[8] (Pet. App. at 10a-11a.)

The Tenth Circuit recently considered an analogous situation, where the lessee of Indian land brought a takings claim after the Department of the Interior rescinded approval of a lease because the court invalidated its initial approval due to the lack of an environmental study. *Sangre de Cristo Dev. Co., Inc.* v. *United States*, 932 F.2d 891 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1760 (1992). The court recognized that for the lease to have been valid, the Department's approval was required. Absent such approval, the lessee never acquired a vested interest in the lease. *Id.* at 894.

Applying these same principles to Bresnan's claim, it is readily apparent that Bresnan never acquired a vested interest in the franchise. The transfer was expressly conditioned on Huntsville's approval. Absent such approval,

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[8] Bresnan argues that the Eleventh Circuit could not have concluded that Bresnan's contract rights had not vested without looking at the Purchase Contract. (Pet. at 11, 14 n.6.) Bresnan's reliance on *Ruckelshaus* for this proposition is misplaced. *Ruckelshaus* only suggests that a factual inquiry is appropriate to determine whether a *taking* of property has occurred, not to determine whether there is a property interest. *See Ruckelshaus*, 467 U.S. at 1005, 1010-12. As the Eleventh Circuit correctly noted, "the determination of whether a contractual interest is a property interest is purely a legal question that does not require the factual inquiry Bresnan urges." (Pet. App. at 10a.) *See Marine One, Inc.* v. *Manatee County*, 877 F.2d 892, 894 (11th Cir. 1989) ("Whether state law has created a property interest is a legal question for the court to decide."). In any event, Bresnan has always asserted at every stage of this case the only relevant fact about the Purchase Contract—that Bresnan's right to purchase the cable systems was contingent on Huntsville's approval of the transfer of Cable Alabama to Bresnan. *See supra* at 2-3. Given Bresnan's admission of this fact, there was no need for further factual inquiry for the District Court and Eleventh Circuit to conclude that execution of the Purchase Contract was contingent on Huntsville's approval of the transfer of Cable Alabama to Bresnan.

the Purchase Contract simply did not give Bresnan a vested property interest. In view of this obstacle, all Bresnan had was a frustrated "expectation" that Cable Alabama would be permitted to transfer ownership of its franchise to Bresnan. Such a tenuous interest is not a compensable interest.[9] Thus, Bresnan had no valid property interest in the Purchase Contract.[10]

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[9] *See, e.g., United States ex rel. Tenn. Valley Auth.* v. *Powelson*, 319 U.S. 266, 282 (1943) (the Constitution requires only that the sovereign pay for that which it takes, "not for opportunities which the owner may lose"); *United States* v. *6,321 Acres of Land*, 479 F.2d 404, 406 (1st Cir. 1973) (expectation of future income from property taken by government is not a compensable interest); *Evanston Ins. Co., Inc.* v. *Merin*, 598 F. Supp. 1290, 1316 (D.N.J. 1984) (property within the meaning of the just compensation clause must consist of more than a mere contractual expectation); *United States* v. *180.37 Acres of Land*, 254 F. Supp. 209, 211 (W.D. Va. 1966) (a mere contractual relation not creating "an actual estate or interest in the soil" is insufficient to recover compensation).

[10] Even assuming *arguendo* that Bresnan had a compensable property interest in the Purchase Contract, the actions of Huntsville in denying the transfer did not constitute a taking under the Fifth Amendment. As the Supreme Court noted in *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 508-09 (1923), there are a number of situations in which government action may interfere with or even destroy the value of private property without invoking the Fifth Amendment. A state may, through the exercise of its police power and without paying compensation, place restrictions upon the use of property, even where such use restrictions destroy the property's value, and this power is not lessened just because the property happens to be a contract. *Id.* at 509. For example, the Takings Clause applies only to "a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467, 484 (1911) (citation omitted). Where legitimate government action has the consequential effect of *frustrating* contractual rights, there is no taking under the Fifth Amendment. *Omnia*, 261 U.S. at 510. There are a number of cases in which governmental action has had the result of frustrating contractual rights or expectations; the courts have held in these cases that frustration of "the opportunity to exploit a contract" is not a taking. *PVM Redwood Co.* v. *United*

II. Huntsville Acted Properly in Denying the Transfer Request

Bresnan incorrectly claims that the Eleventh Circuit failed to consider whether Huntsville acted "lawfully and in compliance with applicable statutory and constitutional law" in upholding the District Court's finding that Bresnan had no property interest in the Purchase Contract. (Pet. at 9-10.) In fact, the Court of Appeals squarely addressed the District Court's review of Bresnan's claims that Huntsville's denial of the transfer was unlawful. (Pet. App. at 8a.)

Bresnan's argument that Huntsville's transfer decision was unlawful is based on Bresnan's continuing effort to confuse Huntsville's transfer decision at issue in this case with the transfer decision at issue in *Cable Alabama*. As a result, Bresnan mistakenly argues that the District Court's decision in *Cable Alabama* controls this case. (Pet. at 4.) Bresnan repeatedly asserts that Huntsville's denial of the Cable Alabama-Bresnan transfer request was found "illegal and improper" in the District Court's decision in *Cable Alabama*. *See, e.g.*, Pet. at 4. This assertion, key to all of Bresnan's arguments, is plainly wrong for the following reasons.

States, 686 F.2d 1327, 1329 (9th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983). *See also T.O.F.C., Inc.* v. *United States*, 683 F.2d 389, 393-96 (Ct. Cl. 1982) (government transfer of bankrupt railroad's property which frustrated joint venture between plaintiff and bankrupt railroad to construct railroad terminal facilities was not an impermissible taking). In order for there to be a taking, the governmental action must have the effect of appropriating what the plaintiff actually owns, rather than merely making it impossible for the plaintiff to enjoy the fruits of a contract. *PVM*, 686 F.2d at 1329. Huntsville, by the terms of Cable Alabama's franchise agreement, had the right to disapprove a transfer of the franchise to another party. Huntsville's decision to exercise that right was fully within its authority, and such disapproval merely had the consequential effect of frustrating Bresnan's expectations under the Purchase Contract. Such frustration of a contract as the result of the exercise of legitimate governmental power cannot be considered a taking under the Fifth Amendment. *Omnia*, 261 U.S. at 510.

First, as the Court of Appeals noted, Congress clarified Section 613(d) after the *Cable Alabama* decision, and before the District Court's dismissal of Bresnan's action, in such a way as to leave no doubt that Huntsville was acting within its legal authority in denying the transfer. (Pet. at 8a n.5.)

Congress, in clarifying Section 613(d) in the 1992 Act, made clear that *Cable Alabama* was wrongly decided. The District Court in *Cable Alabama* held that, under Section 613 of the 1984 Act, Huntsville had improperly blocked the Cable Alabama-Comcast transfer on the grounds that Comcast would own both cable systems in Huntsville, thereby eliminating competition. *Cable Alabama*, 768 F. Supp. at 1495-1501. However, the 1992 Act amended Section 613(d) to clarify that such refusal to approve a transfer is within a local government's legitimate authority. 47 U.S.C. § 533(d) (Supp. 1992).

This new language simply clarifies the law under which *Cable Alabama* was decided, and makes clear that the decision in *Cable Alabama* was decided incorrectly. Congress stated that the ruling in *Cable Alabama* "clearly [was] inconsistent with the intent of subsections 613(c) and 613(d)." House Report at 91. (App. at 19a.) The clarifying language was added to the existing language of Section 613(d) to "overturn[] the decision in *Cable Alabama Corp.*" *Id.*

Thus, Bresnan's claim that Huntsville's denial of the transfer was improper under Section 613 based on the District Court's holding in *Cable Alabama* is without merit, and Huntsville's denial of the transfer was proper.[11]

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[11] Bresnan further suggests that the amendments to Section 613(d) do not have retroactive application. (Pet. at 8 n.3.) The parties fully briefed this issue before the District Court in addressing Bresnan's argument against retroactive application of the amendments to its claim for a declaratory judgment that Huntsville violated Section 613. (Pet. App. at 26a-27a.) Retroactive applica-

Second, the ruling by the District Court in *Cable Alabama* allowing the plaintiff Cable Alabama to pursue its takings claim was based on circumstances fundamentally different from those found in the case at hand. In *Cable Alabama* it was arguable that Cable Alabama, as the *owner* of the system in question and a party to the franchise agreement with Huntsville, had a vested property interest in its franchise, in which case a factual analysis of the reasonableness of Huntsville's action might have been appropriate. Bresnan, on the other hand, clearly had no property interest in any franchise with Huntsville, and never had a vested property interest in the Purchase Contract. Without any vested property interest, Bresnan had no colorable takings claim. *See Acton* v. *United States*, 401 F.2d 896, 899 (9th Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969).

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tion of the amendment to Section 613(d) is appropriate in this case. A court is required to apply Section 613 as amended to this action "unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary." *Bradley* v. *School Bd. of Richmond*, 416 U.S. 696, 711 (1974). The amendments to Section 613(d) simply clarify its meaning, which was called into question for the first time by *Cable Alabama*. The amendments clarify that the *Cable Alabama* decision did not follow the intent of Congress and, thus, that decision did not bind the District Court in this case. Such amendments, therefore, are not substantive amendments that make retroactive application of Section 613(d) inappropriate under *Bradley*. *See, e.g., Andrade* v. *Crawford & Co.*, 786 F. Supp. 1302, 1307 (N.D. Ohio 1992) ("this Court will not apply a new law to a pending case if it retroactively alters 'substantive rights and liabilities.' A return to the law as it existed prior to [an incorrect court decision], however, will not necessarily alter the parties' legal expectations"). Retroactive application of Section 613(d) accords with numerous courts that have applied an amended statute retroactively where Congress simply was correcting a previous interpretation of the statute, rather than creating new law. *See, e.g., Mrs. W* v. *Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987); *Leake* v *Long Island Jewish Medical Ctr.*, 695 F. Supp. 1414, 1417 (E.D.N.Y. 1988), *aff'd*, 869 F.2d 130 (2d Cir. 1989). Retroactive application does not impose any injustice on Bresnan since the 1992 Act clarified that Bresnan never had a cause of action based on Section 613.

Third, as the Eleventh Circuit noted (Pet. App. at 8a.), the District Court made it clear that its holding in *Cable Alabama* addressed only Huntsville's denial of the transfer of the franchise held by Cable Alabama to Comcast, and did *not* address Huntsville's denial of the transfer of the Cable Alabama franchise to Bresnan. *See* Dec. 4 Mem. Op. at 5 ("On August 6, 1991, in *Cable Alabama Corp.*, this court held that Huntsville's refusal to permit Cable Alabama's transfer of its franchise rights to Comcast violated Cable Alabama's rights. *There has never been a determination that Huntsville violated Bresnan's rights when it refused the transfer of Cable Alabama in April 1990.*") (emphasis supplied). (Pet. App. at 23a-24a.)

Similarly, Bresnan's suggestion that the District Court did not view Congress' amendment to Section 613(d) of the 1992 Act as nullifying its constitutional holdings in *Cable Alabama* is also incorrect. (Pet. at 8 n.3.) The District Court's finding that Huntsville's actions in denying the Cable Alabama-Comcast transfer violated the First and Fourteenth Amendments was inextricably linked to its holding, overruled by the 1992 Act, that Huntsville had violated Section 613 of the Cable Act. The District Court made clear that its holdings on the constitutional issues were "affected" by the amendments to Section 613. In dismissing Bresnan's First Amendment and vagueness challenges to Huntsville's actions, the District Court stated:

> In *Cable Alabama Corp.* v. *City of Huntsville*, 768 F. Supp. 1484 (N.D. Ala. 1991), *this court declared Section 14 of the franchise agreement between Cable Alabama and Huntsville to be illegal and void in violation of Section 613 of the Federal Cable Act, the Supremacy Clause and the First and Fourteenth Amendments to the United States Constitution.* The court entered an order permanently restraining and enjoining Huntsville from enforcing or attempting to enforce the provisions of Section 14 of the franchise agreement. *Although the basis for the court's ruling*

> *in Cable Alabama is affected by the amendment to Section 613*, the declaratory judgment and the injunction are not affected.

Dec. 4 Mem. Op. at 8 (emphasis added). (Pet. App. at 23a-24a.) The District Court's statement, together with its dismissal of Bresnan's First Amendment and vagueness challenges to Huntsville's actions, makes it clear that the amendments to Section 613(d) affected the District Court's views on the constitutional questions presented in *Cable Alabama*. Hence, Bresnan may not rely on the holdings in *Cable Alabama*, as if none of this history existed, to suggest to this Court that Huntsville's denial of the Cable Alabama-Bresnan transfer was unlawful.

Bresnan's use of the *Cable Alabama* decision as proof that Huntsville acted improperly in denying the transfer is essentially an attempt to invoke offensive collateral estoppel on this issue. However, as demonstrated above, Congress has, since the time of the *Cable Alabama* decision, clarified the law to make it clear that such decision was not properly rendered in accordance with Section 613. Collateral estoppel is not available in such circumstances, where the judgment in question is based on obsolete or erroneous principles.[12] Moreover, the District Court below expressly found that collateral estoppel did not apply against Huntsville and, as the Eleventh Circuit noted, the District Court's collateral estoppel decision was not challenged by Bresnan on appeal. (Pet. App. at 8a.)

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[12] *See Montana* v. *United States*, 440 U.S. 147, 155 (1979) (collateral estoppel is not appropriate in instances where "controlling facts or legal principles have changed significantly" or where "other special circumstances warrant an exception to the normal rules of preclusion"); *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948) (collateral estoppel "is not meant to create vested rights in decisions that have become obsolete or erroneous with time"); *Brock* v. *Williams Enters. of Georgia, Inc.*, 832 F.2d 567, 574 (11th Cir. 1987) ("Collateral estoppel is a discretionary doctrine that has no application where there has been an intervening change in legal principles.").

III. Alabama Law Does Not Support Bresnan's Claimed Property Right

Bresnan wrongly asserts that the Eleventh Circuit "utterly ignored" Bresnan's argument that it had a cognizable property interest under Alabama law. (Pet. at 6.) Bresnan fails to note that Alabama law, as demonstrated by the Alabama cases upon which Bresnan relies, does not directly address the issue on appeal, which is whether Bresnan had a property right in its *contingent* contractual expectation of acquiring Cable Alabama.[13] *Olen Real Estate & Inv. Co.* v. *L.A. Zieman & Co.*, 110 So. 2d 890 (Ala. 1959)—the only Alabama case that Bresnan presented to the Eleventh Circuit on the issue—and *Bama Budweiser of Montgomery, Inc.* v. *Anheuser-Busch, Inc.*, 611 So. 2d 238, 244-45 (Ala. 1992) are inapposite. Those cases simply suggest that a contract subject to fulfillment of a condition by a third party is a valid contract, and do not address under what circumstances a contract constitutes property. Whether Bresnan's Purchase Contract was valid between the parties to it is irrelevant to this case. What is relevant is that Bresnan's right to purchase the Huntsville cable systems could not vest unless Huntsville approved the transfer of Cable Alabama's franchise to Bresnan.[14]

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[13] Moreover, particularly in the absence of Alabama law on this issue, the Eleventh Circuit was not bound by state law in determining whether Bresnan had a property interest that was entitled to Fifth Amendment protection. *See, e.g., United States* v. *3035.73 Acres of Land*, 650 F.2d 938, 939-40 (8th Cir. 1981).

[14] The Eleventh Circuit never suggested that a contract could not be property under Alabama law. The Eleventh Circuit only concluded that the Purchase Contract, conditioned on approval by Huntsville of the transfer of Cable Alabama's cable system to Bresnan before it could vest, did not constitute property. Hence, *Randall* v. *H. Nakashima & Co.*, 542 F.2d 270, 273 (5th Cir. 1976), which simply stands for the proposition that a vested contract between two parties may constitute property for tax purposes, is

As explained above, based on its review of the relevant case law, the Eleventh Circuit correctly upheld the District Court's holding that Bresnan had no vested property interest to which to apply a takings analysis. Given the absence of a property interest, the District Court properly dismissed Bresnan's takings claim.

CONCLUSION

For the foregoing reasons, Huntsville respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Dated: September 29, 1994

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inapposite since that case did not involve a contract that was subject to third party approval before vesting.

The remaining cases upon which Bresnan relies do not even address Alabama law and, thus, are inapposite. *See Leonard Duckworth, Inc.* v. *Michael L. Field & Co.*, 516 F.2d 952, 955 (5th Cir. 1975); *Duggin* v. *Adams*, 360 S.E.2d 832 (Va. 1987); *Southwest Drug Co.* v. *Howard Bros. Pharmacy of Jackson, Inc.*, 320 So. 2d 776, 777 (Miss. 1975). Moreover, those cases address whether intentional interference with contractual rights is actionable under tort law, and the statements by the court in *Leonard Duckworth, Inc.* regarding the property interest in prospective contracts is mere dicta used in the context of a tort case. *Leonard Duckworth, Inc.*, 516 F.2d at 955.

APPENDICES

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APPENDIX A

[Filed Nov. 14, 1991]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Case No. CV-91-N-2675-NE

BRESNAN COMMUNICATIONS COMPANY,
LIMITED PARTNERSHIP,
a Michigan limited partnership,
Plaintiff,

-vs-

CITY OF HUNTSVILLE, ALABAMA, JIM PUTNAM, in his official capacity as a member of the Huntsville City Council, JIMMY WALL, in his official capacity as a member of the Huntsville City Council, BILL KLING, JR., in his official capacity as a member of the Huntsville City Council, RICHARD SHOWERS, SR., in his official capacity as a member of the Huntsville City Council, ERNEST KAUFMANN, in his official capacity as a member of the Huntsville City Council, and STEVEN HETTINGER, in his official capacity as Mayor,
Defendants.

COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES AND DEMAND FOR JURY TRIAL

1. This is an action for damages as the result of the City of Huntsville's (the "City") refusal to permit a cable television company to transfer its cable television operations in Huntsville to Plaintiff. This refusal by the City violates the Federal Cable Communications Policy Act of 1984, 47 U.S.C. §§ 531 *et seq.* ("Cable Act"), and

the First and Fourteenth Amendments of the United States Constitution.

JURISDICTION AND VENUE

2. First Claim of this Complaint proceeds under 47 U.S.C. § 533(d). This Court accordingly has subject matter jurisdiction over this claim based upon 28 U.S.C. § 1331.

3. The Second and Third Claims of this Complaint proceed under, respectively, the First Amendment and the Due Process Clause of the Fourteenth Amendment, as applied to defendants by 42 U.S.C. § 1983. This Court accordingly has subject matter jurisdiction over those claims based upon 28 U.S.C. §§ 1331 and 1343(a)(3).

4. To the extent that each Claim in this Complaint seeks a declaration that Section 14 of the Cable Alabama Franchise Agreement in Huntsville is invalid and void, this Court has jurisdiction under 28 U.S.C. §§ 1331, 2201 and 2202.

5. Defendants are all located within the jurisdiction of this Court. All causes of action asserted herein accrued within the jurisdiction of this Court. Venue in this District is proper pursuant to 28 U.S.C. § 1391(b).

PARTIES

6. The Plaintiff, Bresnan Communications Company, Limited Partnership ("Bresnan"), is a Limited Partnership duly organized and existing under the laws of the State of Michigan.

7. Defendant, the City, is a municipal corporation created under the laws of the State of Alabama, located in Madison County, Alabama, and is the franchising authority for cable television service within the City of Huntsville. The City's legal authority to regulate cable television service is limited by Article XII, Section 220 of the Constitution of Alabama of 1901.

8. Defendants, Putnam, Wall, Kling, Showers, and Kaufmann were, at all relevant times set forth in the Complaint, the members of the Huntsville City Council, pursuant to Alabama law and Huntsville ordinance, exercise the power to approve or disapprove any request to transfer a cable television franchise in Huntsville.

9. Defendant, Hettinger, was, at the all relevant times set forth in the Complaint, Mayor of the City of Huntsville.

FACTS

10. Bresnan is engaged, *inter alia*, in the business of acquiring exhibition and performance rights to programming, some of which is copyrighted, for distribution via its cable television systems. Bresnan pays the originators of the programming for such exhibition and performance rights. Bresnan is an authorized distributor of such television programming to subscribers through its local cable television distribution systems.

11. To deliver a satellite-delivered television signal to a subscriber, the cable operator receives the signal at its "head-end" facility using a satellite "receive-only" dish. The signal is then sent throughout the community on the cable operator's main cable trunk line, which in turn is distributed to additional cable lines. The signal from the distribution line is split off at a "pedestal" for delivery of the signal to individual subscribers. Bresnan purchases, installs and maintains coaxial cable and related equipment for the transmission of programming to its subscribers, which cost millions of dollars.

12. Through various license agreements, Bresnan has acquired the rights to exhibit, perform and retransmit such programming to its subscribers. Bresnan has entered into master contracts with program suppliers, which authorize it to distribute programming services such as Home Box Office ("HBO"), Cinemax, Showtime, The Movie Channel, Cable News Network, ESPN, The Disney Channel, MTV, USA Network, Bravo, WTBS, Arts &

Entertainment Network ("A&E"), Country Music Television, Lifetime, Nickelodeon, Nashville Network, Consumer News and Business Channel ("CNBC") and Turner Network Television ("TNT").

13. In operating its cable television system, Bresnan is a member of the media, disseminating news, entertainment and information to its subscribers. Bresnan is therefore a speaker within the meaning of the First Amendment and is entitled to all the rights and privileges granted thereunder.

THE CABLE TELEVISION MARKET IN HUNTSVILLE

14. In or about October 1985, the City of Huntsville was served by a single cable television system operated by Group W Cable, Inc. Apparently, dissatisfied with that system, the City invited proposals from other cable television companies to offer additional cable television service in Huntsville.

15. When the City solicited proposals to build and operate an additional cable system in or about October 1985, Cable Alabama Corporation ("Cable Alabama") operated cable systems in two adjacent jurisdictions, the City of Madison and Redstone Arsenal. Cable Alabama was the only cable company to submit a full proposal to build and operate an additional cable system in Huntsville.

16. The Huntsville City Council approved a franchise for Cable Alabama, which was executed by the City and Cable Alabama on March 1, 1986 ("Franchise Agreement").

CABLE ALABAMA'S OPERATIONS

17. Upon receiving its Huntsville franchise, Cable Alabama beagn building a cable television system in Huntsville. On information and belief, Cable Alabama's

Huntsville system can provide cable service to almost two-thirds of the homes in Huntsville. Most of the homes passed by Cable Alabama's system also can receive service from the former Group W cable television system, which has been acquired by and is now operated by Comcast Cablevision of Huntsville, Inc. ("Comcast").

18. Cable Alabama's entry into the Huntsville market was based upon the projection that it could acquire subscribers at the rate of 30 subscribers per mile of constructed cable. Cable Alabama anticipated achieving such subscriber rates by providing high quality plant, equipment, service and competitive pricing.

19. During its initial construction period in Huntsville, Cable Alabama substantially exceeded its target subscriber levels.

20. In or about the summer of 1986, shortly after Cable Alabama had begun building its Huntsville system, Comcast acquired Group W's cable system and began to upgrade its service and implemented major price reductions which greately reduced Cable Alabama's ability to attract subscribers.

21. During the competition between Comcast and Cable Alabama, Huntsville enjoyed the lowest cable prices in the nation, paying 70 percent less for cable television than subscribers in most other communities. In contrast, Comcast and Cable Alabama certainly do not enjoy the lowest overhead costs in the country.

22. After more than four years of head-on competition between Comcast and Cable Alabama, the Huntsville City Council retained Price Waterhouse in January 1991 to examine the financial condition of Comcast and Cable Alabama in their Huntsville operations. According to a City Council Committee report dated February 7, 1991, Price Waterhouse concluded that "Comcast and Cable Alabama have not generated sufficient cash flow over the past five years to meet all of their cash require-

ments," and that "net cash flow is significantly negative for both companies over this period." The Committee report also stated that for both companies to survive in Huntsville, higher cable rates "would be required to prevent a deterioration in system performance, and provide long-term financial viability."

23. On information and belief, as of this date, Cable Alabama has succeeded in attracting Huntsville subscribers at a rate of only 18 subscribers per mile of constructed cable, which is insufficient to permit the profitable operation of its Huntsville system under either its initial projections in 1986 or current market conditions. In other terms, Cable Alabama's market share has never exceeded twenty percent of all cable subscribers in Huntsville.

SECTION 14 OF THE FRANCHISE

24. The defendants' refusal to approve the transfer of Cable Alabama's franchise to Bresnan was premised upon Section 14 of the Franchise Agreement between the City and Cable Alabama. That provision grants the Council the power to approve or disapprove the transfer of the Franchise, or any rights under that Franchise, or in the cable television system, or any change in control of Cable Alabama.

25. Section 14.1 of the Franchise Agreement also provides:

> In the event that the Company [Cable Alabama] shall desire to transfer or assign the franchise or any of the rights, privileges or immunities contained therein, to any existing Cable TV Franchise of the City, the City Council reserves the right to disapprove such transfer or assignment on any ground stated elsewhere in this Section 14, and also the City Council may consider the impact which said transfer would have upon the availability of a modern state of the art channel transmission capability system to

subscribers generally within the City of Huntsville as well as the impact such transfers would have upon competition.

26. The remaining provisions of Section 14 do not specify any particular standards to be applied by the City Council to a request to transfer Cable Alabama's franchise or for a change in a control.

A. Section 14.2 requires any application to transfer the franchise or change control of Cable Alabama to provide a "justification" for the action;

B. Section 14.3 authorizes the City Council, when reviewing a petition for transfer or change of control, to inquire into "(i) the qualifications of each person (who would gain control of Cable Alabama or its franchise) involved in any action described in Section 14.1 hereof, (ii) all matters relevant to whether (the transferee) will adhere to all applicable provisions of this Agreement, and (iii) all other relevant matters."

THE BRESNAN PROPOSAL

27. In 1989, Cable Alabama began negotiations with Bresnan, concerning the possible acquisition by Bresnan of Cable Alabama's Huntsville cable system.

28. On or about August 30, 1989, Bresnan and Cable Alabama reached an agreement for Bresnan to purchase the Huntsville cable system of Cable Alabama. At roughly the same time, Bresnan reached agreement with Comcast to purchase Comcast's cable system in Huntsville.

29. Pursuant to Section 14 of the Cable Alabama franchise, Cable Alabama had to acquire approval by the City of the transfer of its cable system to Bresnan.

30. The City Council had no power to approve or disapprove transfer of Comcast's Huntsville franchise.

Nevertheless, Bresnan's purchase of the Comcast system in Huntsville was contingent upon approval by defendants of Bresnan's acquisition of the Cable Alabama system.

31. By letter dated August 30, 1989, Cable Alabama notified the City of the proposed Bresnan acquisition. In a response dated September 14, 1989 and signed by the Huntsville City Attorney, the City propounded 45 interrogatories and requests for information concerning the proposed transaction. Cable Alabama responded to those requests on September 28, 1989, which prompted the City on October 13, 1989 to issue twelve more interrogatories and requests for information. A further response was submitted by Cable Alabama on October 16, 1989.

32. On October 24, 1989, Bresnan responded to the request for information from the City related to the proposed transfer of Cable Alabama's franchise agreement with the City to Bresnan.

33. By letter dated November 3, 1989, Cable Alabama notified the City of its concern that the City's review of the proposed Bresnan acquisition was behind schedule and in violation of the time frame required by the Franchise Agreement for such review. Also on November 3, 1989, Cable Alabama representatives met with City representatives to review the proposed acquisition.

34. When the City took no action on Cable Alabama's petition, Cable Alabama sent a letter dated December 4, 1989, to submit an "urgent plea" that defendants' review and action be completed in December. Cable Alabama made similar arguments in a letter to the City dated January 9, 1990, by which time the City still had not acted.

35. The Huntsville City Council did not hold a hearing on Cable Alabama's petition to transfer to Bresnan until March 22, 1990, more than six months after the petition was first filed. During that hearing, the remarks by the then-President of the City Council, by defendant

Hettinger, and by the public focused largely on the impact of the Bresnan transfer (i) on competition, since Bresnan would acquire both Huntsville system, and (ii) on the low rates charged to cable subscribers in Huntsville.

36. On April 10, 1990, the Huntsville City Council voted unanimously to reject the petition to transfer the Cable Alabama system to Bresnan. A Huntsville city official was quoted by the press to the effect that the City's rejection of the Cable Alabama/Bresnan petition "was based almost entirely 'on their desire to preserve the competitive environment in Huntsville.' "

37. Before the City Council vote was taken, in an article published in the Huntsville Times on March 3, 1990, defendant Kling was quoted as follows about the Cable Alabama/Bresnan petition: "I'm concerned about the effect of the transfer, if we approve it, on competition as well as rates. Those are the major issues I'm concerned with."

THE CABLE ALABAMA LAWSUIT AGAINST THESE DEFENDANTS

38. On March 21, 1991, Cable Alabama filed its Complaint against these defendants in the United States District Court for the Northern District of Alabama for, *inter alia*, the identical causes of action raised by Bresnan in this action, as a result of the defendants' refusal to approve the sale and transfer of Cable Alabama's cable system and franchise to Bresnan.

39. On or about August 6, 1991, this Court entered an Order and Permanent Injunction against the defendants and in favor of Cable Alabama enjoining defendants from preventing Cable Alabama from transferring its cable franchise to Comcast.

40. In that Order, the Court found that:

> Comments of the mayor and members of the council suggest that they were not particularly aware of

> or concerned about any restrictions that the Cable Act might have placed upon the city's authority to consider Bresnan's possible ownership of other media in the community.

Order at 11.

41. Cable Alabama's second claim in its complaint, identical to Bresnan's first claim herein, was for federal preemption under the Cable Act, 47 U.S.C. § 533. With respect to this claim, the Court concluded that:

> § 533 (c) and (d) say, and mean, simply that the FCC is authorized to regulate the ownership and control of local cable television systems by persons on the basis of ownership or control of other local cable television systems and that local franchising authorities, such as the City of Huntsville, may not prohibit the ownership or control of a local cable television system. *This is so whether the City couches its decision in terms of maintaining a "competitive" cable television market or otherwise.*

Order at 22-23 (emphasis added).

42. Moreover, the Court noted that the defendants argued that they based their decision to reject the Cable Alabama request to transfer its franchise to Comcast "on the fear that Comcast would abuse its market power once it gained a monopoly position in the Huntsville cable television market. . . ." *Id.* at 29. However, as to Bresnan's attempted purchase of Cable Alabama's cable system and franchise, the Court found that "[t]here was no excuse available when the City was faced with the Bresnan transfer request. . ." *Id.* at 30. In conclusion, the Court entered summary judgment on the plaintiff's Cable Act claims.

43. Although Cable Alabama's First Amendment claim is slightly different than Bresnan's—Cable Alabama's claim was based upon its right *not* to speak, while Bresnan's claim is based upon its right to speak—the

Court found that "at the very least, 'a cable operator has a protected first amendment [sic] interest in its original programming [and its] editorial discretion over which stations or which programs to include in its repertoire' ". Order at 33. The Court also noted that "[a] number of lower federal courts have considered claims involving First Amendment rights of cable television operators. All have agreed that such rights are available. . . ." *Id.* at 35. The Court granted Cable Alabama's motion for summary judgment on its First Amendment claim.

44. Finally, identical to Cable Alabama's fourth claim in its complaint for denial of due process under the Fourteenth Amendment, Bresnan's Third Claim herein is brought under the same cause of action.

45. Again, in its Order, this Court held that "where a statute implicates First Amendment concerns, it must have a clear application in all circumstances or it will be found entirely void." Order at 42. Moreover, the Court concluded that:

> Section 14 allows for an open-ended, unguided and unstructured decision-making process by the defendants. It permits consideration of a proposed' transferee's qualifications without any standard to determine what qualifications the transferee must meet. Such qualifications are apparently left to the unfettered discretion of the mayor and councilmen. . . . The section is unconstitutionally vague and the plaintiff will be granted summary judgment on its fourth claim.

Id. at 46-47.

46. The defendants had a full and fair opportunity to present their defenses and theory of the case to the Court, and had sufficient incentive to litigate fully the issue of liability on all causes of action identical to those raise herein by Bresnan.

47. The determination of the issues in the prior litigation between the defendants and Cable Alabama were a critical and necessary part of the judgment in that earlier action.

48. Bresnan is entitled to the collateral estoppel effect of the Court's Judgment.

COUNT I

FEDERAL PREEMPTION UNDER CABLE ACT, 47 U.S.C. § 533(c) and 533(d); SUPREMACY CLAUSE AND 47 U.S.C. § 556(c)

49. Bresnan repeats, realleges and incorporates by reference paragraphs 1 through 42 and 46 through 48 of this Complaint as if fully set forth herein.

50. Defendants' rejection of the proposed transfer of Cable Alabama's franchise to Bresnan in March 1990 was based upon the "cross-ownership" clause in Section 14.1 of the Franchise Agreement and upon defendants' objection to Bresnan's intended ownership of both the Comcast and the Cable Alabama cable systems in Huntsville.

51. Consequently, defendants' denial of the requested transfer of Cable Alabama's franchise to Bresnan violated the Cable Act. Section 533(d) of the Cable Act absolutely bars the City from preventing the acquisition of a cable franchise on the ground that the franchise controls another cable franchise in that community. Additionally, Section 533(c) of the Cable Act gives the FCC exclusive power to regulate cross-ownership issues. Therefore, defendants' actions violate the Constitution's Supremacy Clause and 47 U.S.C. § 556(c), which make the Cable Act the supreme law of the land notwithstanding any contrary state or local law.

52. As a direct and proximate result of defendants' unlawful refusal to permit Cable Alabama to transfer its Huntsville cable television franchise to Bresnan, Bresnan

has suffered damages, including loss of profits, interest and attorneys' fees.

COUNT II

DENIAL OF FIRST AND FOURTEENTH AMENDMENT RIGHTS TO SPEAK; 42 U.S.C. § 1983

53. Bresnan repeats, realleges and incorporates by reference paragraphs 1 through 40, 43 and 46 through 48 of this Complaint as if fully set forth herein.

54. By refusing to permit Cable Alabama to transfer its franchise to Bresnan in March 1990, defendants have denied Bresnan's right to speak under the First and Fourteenth Amendments.

55. The actions alleged herein were undertaken by the City through its Mayor and City Council, who are officials with the highest policy-making authority in the City. The actions therefore constitute official City action and policy. The City was acting under color of state law when engaging in the unlawful conduct alleged herein.

56. Defendants' denial of Bresnan's First and Fourteenth Amendemnt rights does not further an important or substantial governmental interest, nor is it greater than is essential to further that interest.

57. Consequently, defendants' rejection of the Bresnan transfer constituted a deprivation of Bresnan's First and Fourteenth Amendment rights under color of state law, in direct violation of both the First and Fourteenth Amendments and 42 U.S.C. § 1983.

58. These actions have caused or will cause damage to Bresnan including loss of its ability to attract and retain customers, the value of its business investment, revenue, costs associated with complying with the terms and conditions of the City, goodwill and profits. Plaintiff has also suffered other compensatory damages.

59. As a result of the foregoing, Bresnan is entitled to compensatory damages, interest, costs, attorneys' fees

as provided for in 42 U.S.C. § 1988, and declaratory relief as more fully set forth below.

COUNT III

VAGUENESS; DENIAL OF DUE PROCESS UNDER FOURTEENTH AMENDMENT; 42 U.S.C. § 1983

60. Bresnan repeats realleges and incorporates by reference paragraphs 1 through 40, 44 and 45 through 48 of this Complaint as if fully set forth herein.

61. Section 14 of the Franchise Agreement, pursuant to which defendants rejected the proposed Bresnan transfer provides no specific standards or criteria for judging any petition for transfer of the franchise or change in control.

62. This complete lack of standards or criteria renders Section 14 unconstitutionally vague and constitutes a denial of due process of law guaranteed by the Fourteenth Amendment of the United States Constitution. Because this vagueness inhibits the exercise of Bresnan's constitutionally protected speech rights, it is particularly objectionable.

63. Because defendants rejected the proposed Bresnan transfer under the unconstitutionally vague provisions of Section 14 of the Franchise Agreement, under color of state law, those actions deprived Bresnan of its due process rights in direct violation of the Fourteenth Amendment and 42 U.S.C. § 1983.

64. The above-described improper discrimination has no rational basis and is not rationally related to and does not further any substantial or legitimate governmental interest. Instead, the result of the discrimination is a direct impingement on Bresnan's First and Fourteenth Amendment rights of free speech and cannot be supported under a strict scrutiny analysis.

65. The actions alleged herein were undertaken by the City through its Mayor and City Council, who are

officials of the highest policy-making authority in the City. The actions therefore constitute official City action and policy. The City was acting under color of state law when engaging in the unlawful conduct alleged herein.

66. These actions have caused or will cause damage to Bresnan, including loss of its contractual and legal rights, loss of the value of its business investment, loss of revenue, costs associated with complying with the terms and conditions of the requirements of the City, loss of goodwill and profits, and other compensatory damages.

67. As a result of the foregoing, Bresnan is entitled to compensatory damages, interest, costs, attorneys' fees as provided for in 42 U.S.C. § 1988, and declaratory relief as more fully set forth below.

WHEREFORE, Bresnan demands the following relief:

1. A declaration, pursuant to 28 U.S.C. §§ 2201 and 2202, that Section 14 of the Franchise Agreement is illegal and void because it violates the Federal Cable Act, 47 U.S.C. § 533(d); and the Supremacy Clause of the United States Constitution, Article VI, Section 2; and the First and Fourteenth Amendments of the United States Constitution;

2. Compensatory damages in excess of $50,000.00 including prejudgment and post-judgment interest;

3. An award of costs and attorneys' fees under 42 U.S.C. § 1988; and

4. Such other and further relief as this Court may deem just and proper.

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APPENDIX B

[Entered Sept. 18, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CV-91-N-2675-NE

BRESNAN COMMUNICATION COMPANY,
LIMITED PARTNERSHIP,
Plaintiff,

vs.

CITY OF HUNTSVILLE, ALABAMA, *et al.*,
Defendants.

ORDER

This cause is presently before the court on Bresnan's Motion for Partial Summary Judgment, filed August 5, 1992. Upon due consideration, the court finds Bresnan has not established that the issues it seeks to collaterally estop defendants from litigating are identical to issues actually litigated in *Cable Alabama Corp.* v. *City of Huntsville*, 768 F. Supp. 1484 (N.D. Ala. 1991). Therefore, the motion for summary judgment is DENIED.

Done, this 18th of September, 1992.

/s/ Edwin L. Nelson
EDWIN L. NELSON
United States District Judge

APPENDIX C

EXCERPT FROM HOUSE COMM. ON ENERGY AND COMMERCE, REPORT ON THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 90-91 (1992).

SECTION 4. MULTIPLE FRANCHISES

Subsection (c) amends Section 613(d) of the Communications Act and states that nothing in this section shall be interpreted to prevent any State or franchising authority from prohibiting the ownership or control of any cable system in a jurisdiction by any person (1) because of such person's ownership or control of any other cable system in such jurisdiction; or (2) in circumstances in which the State or francising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction.

The amendment to subsection 613(d) clarifies the meaning of the subsection. The amendment to subsection 613(d) is not intended to prohibit a franching authority from denying any person's right to acquire ownership or control of a cable system in circumstances under which such acquisition may reduce or eliminate competition in the delivery of cable services in that market.

The meaning of subsections 613(c) and 613(d) was called into question by *Cable Alabama Corp.* v. *City of Huntsville*, 768 F. Supp. 1484 (N.D. Ala. 1991). In that case, the City of Huntsville denied the transfer of a franchise to a cable operator who planned to combine the two competing cable systems in the city and operate them as one cable system—thus ending competitive cable service in Huntsville. The court ruled that subsections (c) and (d) of Section 613, when read together, authorized the FCC "to regulate the ownership and control of local cable television systems by persons on the basis of owner-

ship or control of other local cable television systems and that local franchising authorities * * * may not prohibit the ownership or control of a local cable television system because of ownership or control of any other cable television system." *Cable Alabama Corp.*, 768 F. Supp. at 1496. This ruling clearly is inconsistent with the intent of subsections 613(c) and 613(d). Moreover, it is inconsistent with one of the major purposes of the Cable Act, which is to "promote competition in cable communications," Section 601(6) of the Cable Act, 47 U.S.C. sec. 521(6).

The amendment to subsection 613(d) clarifies the right of franchising authorities to promote competition by denying a franchise to a person if the grant of the franchise would limit competitive cable service in a franchise area. The amendment to Section 613(d) also overturns the decision in *Cable Alabama Corp.*